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In the Supreme Court

of the United States

OCTOBER TERM, 1938

No. 632

THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Appellants,

vs.

DAN E. MAHER, doing business as Interstate Bureau, *Appellee*.

BRIEF OF DAN E. MAHER, Appellee

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In the Supreme Court

of the United States

OCTOBER TERM, 1938

No. 432

THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Appellants

vs.

DAN E. MAHER, doing business as Interstate Busses, *Appellee.*

BRIEF OF DAN E. MAHER, Appellee

OPINIONS BELOW

The majority and dissenting opinions of the specially constituted District Court (R.12-22) are reported in 23 F. Supp. 810. The report of the Interstate Commerce Commission (R. 6-9) is reported in Dan E. Maher, Common Carrier Application, 3 M.C.C. 479.

STATUTE INVOLVED

Appellants state in their brief, that the primary question, excepting the jurisdictional question, involves a construction of the so-called "Grandfather" proviso of Section 206(a) of the Motor Carrier Act, 1935, C. 498, 49 Stat. 543 (U.S.C. Sup. 1, Title 49, Sec. 306(a)[1] (Appellant's Br. 3).

Appellee disagrees with this statement, and contends that not only is the "Grandfather" proviso 206 (a) involved, but, in addition thereto Sections 207 (a) and 208 (a) are involved, and this appeal requires the construction of these particular sections, not only separately, but concurrently, one with the other.

Also the Court's attention is directed to Section 202(a), which section sets forth the "Declaration of Policy", and Section 203(a) (14) which defines a "common carrier by Motor Vehicle".

The foregoing sections are printed in the appendix, infra, page 61.

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[1] The statute will be referred to in the brief as "the Act", and the designation of sections thereof will follow the numeration found in the statute as enacted. Act of August 9, 1935, C. 498, 49 Stat. 543, Sections 201-227, rather than the numeration adopted in the Code (U. S. C. Sup. 1, Title 49, Sections 301-327).

STATEMENT

The evidence upon which the appellee seeks certificate rights, under the Act, is contained in the Findings of Fact heretofore made and entered by the Interstate Commerce Commission,[2] which said Findings of Fact are part of the pleadings in this matter (R. 6).

1. *Commission's Findings of Fact*[3].

The Commission found that applicant (appellee here) has been engaged in the transportation of passengers since 1931 (R. 7); that the service performed was over irregular routes between the States of Oregon and Washington; that the service performed was licensed in the State of Oregon, under an "anywhere-for-hire" permit issued by the Public Utilities Commissioner of Oregon (R. 8); that no certificate was required for the service in Washington (R. 8);[4] that service was performed at various times between 1933 and 1936 to Deep River, Cathlamet, Raymond, Aberdeen, Fall City, La Salle River, Chehalis, Olympia, Seattle, Centralia, Neah Bay, Greenwood, Port Ludlow, and Spokane, all in the State of Washington (R. 8); that service was being performed on June 1, 1935 (R. 9); that U. S. Highway 99 "*probably was used for at least part of*

[2] Hereafter referred to as the "Commission".

[3] Only those factual findings which we deem pertinent to the determination of this matter will be here enumerated.

[4] See Buck vs. Kuykendall, 267 U. S. 307.

the distance on most, if not all, of applicant's trips to Washington" (R. 9); that on May 29, 1936, a regular scheduled service between Portland, Oregon and Seattle, Washington was instituted (R. 7).

2. *Commission's Conclusions of Law*

The Commission concluded, as a matter of law, from the facts found, that applicant was not in bona fide operation as a common carrier of passengers between Portland, Oregon, and Seattle, Washington, over a regular route on June 1, 1935; that upon the commencenment of the regular scheduled service between said points on May 29, 1936, the appellee discontinued and/or abandoned the irregular service being performed on June 1, 1935 (R. 9); that carriers are entitled under the "Grandfather" clause to authority to continue *the bona fide operations* in which they were engaged on June 1, 1935 (R. 8).

In other words, the Commission held that *the operation* conducted by the applicant on June 1, 1935, having been abandoned, had not been "so operated since that time" 206 (a); and that *the operation* applied for, which was commenced on May 29, 1936, was not *the* operation conducted by the applicant on June 1, 1935.

3. *Order of the Commission*

The following order, based upon the Findings of Fact and Conclusions of Law of the Commission,

was made and entered on the 27th day of October, 1937 (R. 9), viz.:

> "It is ordered that said application be and it is hereby denied, effective December 10, 1937.
>
> And it is further ordered, that applicant be, and he is hereby notified and required to cease and desist on or before December 10, 1937, from all operations in interstate or foreign commerce as a common carried of passengers by motor vehicle."

PROCEEDINGS IN THE COURT BELOW

On December 15, 1937, the appellee filed a bill of complaint in the Federal District Court, for the District of Oregon, under the Urgent Deficiencies Act of October 22, 1913, Title 28, U.S.C.A., Section 41 (28) and Sections 43-48, inclusive, and by said proceeding prayed that the Commission's order, as hereinbefore set out, be set aside, annulled and enjoined, on the ground and for the reason that there was no evidence to support the order, that the Commission had exceeded its statutory powers, and had misinterpreted and misapplied the Motor Carrier Act of 1935, thereby denying the appellee due process of law, contrary to the Fifth Amendment of the Constitution of the United States of America (R. 1-3).

The only evidence before the Court, was the appellee's bill of complaint, and the answers of the Interstate Commerce Commission and United States of America, respectively. The answer of the Inter-

state Commerce Commission included, as a part thereof, the full report of the Interstate Commerce Commission, which included Findings of Fact and Conclusions of Law, and Order thereon (R. 4, 7). This was the only evidence before the Court, touching and concerning the appellee's operation, and upon which the appellee has submitted his cause.

Briefly, the appellee contended, in the court below, if it was established before the Commission that the appellee was in bona fide operation as a common carrier of passengers by motor vehicle in interstate commerce on June 1, 1935, *over a route or routes, or within a territory,* and had continued to operate since that time, that, he could not be denied a certificate of public convenience and necessity, in any event, and under the Act, it was incumbent upon the applicant to establish the route or routes, or territory within which he desired to operate,[5] and it was mandatory upon the Commission to issue a certificate under such application, as was reasonable, and to the best interests of the public.

In other words, it is the appellee's contention that the Act did not recognize a distinction between different types of motor carrier service, prior to the enactment of the Act; but, in the interests of a sound

[5] And, pursuant to such contention, the appellee did designate the service he wished to perform, which was substantially over the same route and, at least, within the territory previously served and instituted such service on May 29, 1936.

transportation system, it required operators to systematize their operation, by designating the service to be performed over any route or routes, in which they had previously operated, and if they had operated within a particular territory, to designate type of service which they desired to perform within that territory.

The Court below, in its majority opinion, upheld this contention.

The appellants have fallen into error in their interpretation of the Court's opinion (Appellant's Brief 11).

First: Appellants contend that the Court's opinion in fact rejected the appellee's contention, and was really consistent with the Commission's views, to the effect that the appellee should be confined in his future service to *the operation* conducted on June 1, 1935. So important is this error of appellant's interpretation of the opinion of the Court below that the pertinent provisions of the opinion are here set out in full, viz.: (R. 17, 18, 19)

> "It is true the act also provides that the operation must have been continued. But *the law does not denounce a change of one type of service to another.* Apt words could have been used if this were the intention. Undoubtedly the applicant would be confined to the exact service which he was furnishing on June 1, 1935. However, if one who had been operating a line in May and June of each year prior to June 1, 1935, had thereafter extended his service upon

a year-around basis, it could not be argued that he abandoned the seasonal service. Similarly, if he had thereafter operated for eleven months and in every month except May, he might have abandoned the month of May and might even be confined to transportation in June alone, but he could not entirely be denied a certificate. So Maher might well be confined to an "anywhere-for-hire" service upon U. S. Highway 99 and compelled to cease his 'fixed termini' operation, but he was still operating in interstate commerce over a route and within a territory and could not, therefore, be denied a certificate. The establishment of a 'fixed termini' operation could be deemed an abandonment of a claim for an 'anywhere-for-hire' service in the same territory since the act provides: (Italics ours)

> 'any common carried by motor vehicle transporting passengers under a certificate issued under this chapter may transport in interstate or foreign commerce to any place, special or chartered parties under such rules and regulations as the Commission shall have prescribed.' " Section 208 (c).

"Upon the facts, a distinction between a regular and an irregular route vanishes. The Commission found that all Maher's operations in interstate commerce were probably in part over U. S. Highway 99. This highway, then, is established for part of the distance, at least, as a regular route. It will be noticed that a regular schedule is not mentioned in the definition. If it be held that Maher is no longer entitled to operate over other routes than U. S. Highway 99, he certainly never abandoned his right to serve the public upon that road. If, on June 1, 1935, he was performing an 'anywhere-for-hire' service, it is inconceivable that he forfeited that right by placing his busses on schedule between 'fixed termini' on that road so that those per-

sons who wished to go to any point thereon for hire could do so without making special arrangements. In other words, if he be held to have abandoned his rights on other routes, his operation on U. S. Highway 99 after May 29, 1936, was an attempt to increase his service thereon, rather than to abandon it. But the fact that the Commission by certificate might only authorize an 'anywhere-for-hire' service in the territory contiguous to U. S. Highway 99 and falling short of Seattle, and compel him to cease operations over other highways altogether did not constitute a justification for its denial of his right to service at all."

"The statute gives it sufficient power by the terms of the certificate which it should have issued to protect any type of operations, for it may 'specify the service to be rendered and the routes over which the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate' and could attach 'to the exercise of the privileges granted by the certificate such reasonable terms, conditions and limitations as the public convenience and necessity may from time to time require.' Section 308. The Commission in many cases has heretofore exercised the power conferred upon it by granting the certificate applied for and imposing limitations. The cases of Hibbing, etc. Common Carrier Application, 1. M.C.C. 540; George Cassens, etc. Application, 1 M.C.C. 771; Slagle Contract Carrier Application, 2 M.C.C. 127 are illustrative of such action. In these cases the certificate was granted but delimited in terms in accordance with the previous business of the carrier.

> "The Commission, therefore, took action not permitted to it by the law. All the facts required by Congress for the issuance of a certificate under the proviso of 306 (a) were found. The issuance was, therefore, mandatory. The Commission failed to issue a certificate because two erroneous conclusions of law were drawn; first, that an operation in interstate commerce 'over a route' and 'within a territory' was not entitled to protection when not over a regular route and between fixed termini, and second, that an irregular operation in interstate commerce was abandoned where a regular operation over the same route and within the same territory was carried on."

From the foregoing, it is evident then, that the court below distinguished between *the operation* as conducted by the appellee on June 1, 1935, and *the service,* which was being performed on that date. An analysis of this part of the opinion discloses the real meaning of the above quoted statement. That is, the Court held:

> "* * * The law does not denounce a change of one type of service to another. * * * Upon the facts a distinction between a regular and irregular route vanishes * * * that all of Maher's operations in interstate commerce were probably in part over U. S. Highway No. 99. This highway then is established for part of the distance at least, as a regular route. *It is to be noticed that a regular schedule is not mentioned in the definition.* If it be held that Maher is no longer entitled to operate over other routes than U. S. Highway No. 99, he certainly never abandoned his rights to serve the public upon that road." (Italics ours.)

Therefore, it can readily be seen that the Court below, when referring to the "exact service which he was furnishing on June 1, 1935.", did not refer to any particular type of operation, but referred to the territory which was at that time being served by the appellee.

Second, applicants contend that the court below was in error when it held that the appellee was denied his legal rights by the Commission, when it failed to consider his application under Sec. 207 (a) of the Act, to determine whether public convenience and necessity required a continuance of the operation in which he was engaged, upon his failure to establish certificate rights under Sec. 206 (a) because there was no showing either at the time of the hearing, or was it alleged in appellee's bill of complaint, that public convenience and necessity required such operation (Appellant's Br. 11). But, whether the procedure provided for in Section 207 (a) concerns only applications for new operations, as contended by the appellants, and is not to be considered in connection with applications filed under Section 206 (a), "Grandfather" clause, is at least argumentative.

Appellants contend because the Commission has provided different forms of applications, and adopted different procedure in determining certificate rights under the respective forms, that this fact is determinative of the construction to be placed upon this proviso of the Act. The appellee has at all times

adopted the forms, and followed the procedure designated by the Commission. He has had no other alternative, and suffice it to say, at this time, such action on the part of the Commission is consistent with its Findings and Order involved in this controversy, and this action of the Commission is no less vulnerable to attack because it is, in fact, the initial action taken by it upon which is predicated its Order, which is now subject to review.

The Court did make and enter Findings of Fact, and Conclusions of Law, which were filed nunc pro tunc as of July 9, 1938 (R. 24-28), and based thereon suspended that part of the Commission's order, which denied the appellee the certificate as applied for, until such a time as the Commission either, upon further hearing, or upon the record now in its possession, grants to the plaintiff a certificate *delimited* under the terms of the statute, or denies a certificate in conformity with the statutory requirements; and ordered that the cease and desist order of the Commission be annulled, cancelled and set aside.

ASSIGNMENTS OF ERROR

The appellants have designated, in the transcript of record, fourteen separate Assignments of Error (R. 31). Many of the alleged errors appear to be but a duplication of others. However, appellants, on argument in support of said alleged errors, have summarized the same, and the writer of this,

he appellee's brief, believes that if answer is made directly to the contentions of appellants, as contained in their summarization, much duplication will be avoided. The appellants have summarized and presented the issues involved, as follows (Appellant's Br. Index):

I. The appellee is not entitled to a certificate under Section 206 (a) of the Act.

A. The Commission lawfully refused to issue a certificate under Section 206 (a) authorizing appellee to operate as a common carrier of passengers over U. S. Highway 99, as a regular route, between Portland and Seattle, as fixed termini, and intermediate points, as applied for, because appellee was not so engaged on June 1, 1935.

B. The Commission is not required to issue Appellee a certificate under Section 206 (a) authorizing a re-establishment of any part of the anywhere-for-hire service which he conducted prior to May 29, 1936, and on and before June 1, 1935.

1. Appellee did not continue the service in which he was engaged on June 1, 1935, as Section 206 (a) requires.

2. Appellee did not apply for a certificate authorizing the operation of an anywhere-for-hire, special or charter service over U. S. Highway 99 and it nowhere appears of record that he desires such a certificate or would be willing to perform such a service.

II. The Commission was not obligated to consider appellee's application under Section 207 (a) of the Act and to determine whether the proposed service is or will be required by the

present or future public convenience and necessity.

A. The provisions of Section 206 (a) of the Act did not require the Commission to consider Appellee's application under Section 207 (a).

B. Appellee did not apply for a certificate under Section 207 (a) and his bill of complaint does not allege that the present or future public convenience and necessity requires his regular operation between Portland and Seattle or that he made any claim or presented any evidence with respect to this issue before the Commission.

III. The District Court had no jurisdiction under the Urgent Deficiencies Act to review the order of the Interstate Commerce Commission.

SUMMARY OF ARGUMENT

The appellee contends upon this appeal that the Commission, in denying the application for authority to operate as a common carrier of passengers, upon a fixed termini, scheduled service between Portland, Oregon, and Seattle, Washington, over U. S. Highway No. 99, construed the Act beyond the power which it can constitutionally exercise, and beyond its statutory right, and based its conclusions upon a mistake of law. Interstate Commerce Commission vs. Union Pacific Railroad, 222 U.S. 541-547. Or, in other words, that the action taken by the Commission was arbitrary, unjust, and unreasonable, and contrary to the facts found by it. in violation of the constitutional prohibition against

taking property without due process of law.

It is appellee's contention that he was, on June 1, 1935, a common carrier of passengers in interstate commerce "over a route, routes, or within a territory" between the states of Oregon and Washington, and particularly over routes and within a territory between Portland and Seattle, in these respective states. That the Act did not confine him to "the operation", which was being conducted on the "Grandfather" date, namely, June 1, 1935, but that, having once established a bona fide legal interstate operation, over a certain route or within a territory, it was not only the right of the operator to designate the particular type of service which he wished to perform over such route, and within such territory, but that under the Act it was incumbent upon him to designate the type of service which he wished to perform, which was either fixed termini service, or special or charter service, Sec. 207 (a), and having once designated the type of service to be performed, it was mandatory upon the Commission to authorize the service within reasonable limits and bounds; Sec. 208 (a)[6].

Appellee further contends that, upon designating a certain restricted route within a territory,

[6] District Judge Fee said (Opinion R. 21):

The Commission could thereupon either upon further hearing or upon the record now in its possession, grant to plaintiff a certificate delimited under the terms of the statute or deny the certificate upon findings which would conform with the statutory requirements.

upon which he has previously operated, that such designation, and the performance of service thereover, while amounting to an abandonment of the other routes or territory within which service had been performed, did not amount to an abandonment of service over the route, and within the territory in which service was being performed, so long as it was continuous.

And lastly, that the order of the Commission, and each and every part thereof, was an affirmative order, over which the court had jurisdiction.

ARGUMENT

It is the purpose of the appellee, at this time, to answer directly the affirmative contentions of the appellants, as they chronologically appear in their brief.

I.

THE APPELLEE IS NOT ENTITLED TO A CERTIFICATE UNDER SECTION 206 (a) OF THE ACT, (because)

A. THE COMMISSION LAWFULLY REFUSED TO ISSUE A CERTIFICATE UNDER 206 (a), AUTHORIZING APPELLEE TO OPERATE AS A COMMON CARRIER OF PASSENGERS

OVER U. S. HIGHWAY 99, AS REGULAR ROUTE, BETWEEN PORTLAND AND SEATTLE, AS FIXED TERMINI AND INTERMEDIATE POINTS AS APPLIED FOR, BECAUSE APPELLEE WAS NOT SO ENGAGED ON JUNE 1, 1935 (Appellants' Br. 20).

Appellants contend that appellee failed to make a showing that he was in bona fide operation as a common carrier on June 1, 1935, on a fixed termini scheduled operation between Portland, Oregon, and Seattle, Washington, and because of this failure, the Commission lawfully refused to issue a certificate under Section 206 (a).

In support thereof, the appellants argue the most strict and strained construction of the Act, as is humanly possible. The fallacy here arises, because the Commission read into the Act a wording which is not present. The Act, in plain and distinct language, states:

> "* * * If any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route, or routes, or within the territory for which application is made, and has so operated since that time * * * the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation."

In construing this provision, the Court below

said (R. 16):

> "Congress did not, in this section, require a limitation to 'regular' route or routes, or between 'fixed termini', nor make an exception as to charter or special operations. Neither was an actual 'public convenience and necessity' requisite since Congress deemed the previous actual operation guaranteed the necessity and convenience of the public."

And futher, the Court below said (R. 17):

> "But the law does not denounce a change of one type of service to another. Apt words could have been used if this were the intention."

The Commission attempts to diminish the importance of appellee's operation, because infrequent trips were made over the route, or within the territory, but from the above analysis, as laid down by the Court below, regularity of trips is not the prime essential, and, as said by the court below (R. 16-17):

> "*Bona fide operation over a route, or over a number of routes or within a territory is thus the prime essential. The intention to include all types of operation is made clear by the fact that the applicant was not confined to a route or routes, but was to be qualified if he operated within a territory* * * * but both the 'Anywhere-for-hire' operations, which were begun in 1931 and continued at least until the initiation of the service between Portland and Seattle, in May, 1936, and the operation with 'fixed termini' then begun, and continning to date, were 'over a route' U. S. Highway 99, between two points, and 'within a territory' viz: that territory reached over U. S. Highway 99, and between Portland and Seattle. Maher made application

for this route, and this territory according to the pleadings."[7] (Italics ours.)

Yet, the Commission in its Conclusions of Law, stated (R. 8):

"Carriers are entitled under the "Grandfather" clause to authority to continue *the* bona fide

---

[7] In Black Hills Transportation Company, Common Carrier Application, 2 M.C.C. 391, 395, which was a "Grandfather" application, the Commission said:

"Certain protestants urge that applicant's operation between South Dakota points and Gillette (Wyoming) did not on June 1, 1935, constitute a bona fide operation within the meaning of the Act. *This contention is based on the fact that the first trip to Gillette was made on May 28, 1935, and that only six more trips were made during the next six months.* It is true, as stressed by these protestants, that applicant's trucks were not operated on fixed schedules on known days of each week or month, however, applicant maintained a tariff of its rates to and from Gillette, and its president testified that it was ready and willing to transport, and did transport, all traffic offered to it prior to the institution of this operation. Applicant secured authority from the Public Service Commission of Wyoming to extend its operations to Gillette, and otherwise complied with all requirements of the laws of both Wyoming and South Dakota. There is no suggestion of record, that this extension was not made pursuant to a well conceived plan of extending the transportation service offered to the public by the applicant. Careful consideration of all evidence of record, leads us to the conclusion that applicant's operation to and from Gillette was a bona fide operation on June 1, 1935."

Therefore it can be readily seen that the Commission did not limit "Grandfather" rights to the frequency of the service.

operations in which they were engaged on June 1, 1935, and continuing thereafter."

Nowhere in the Act is any reference made to the expression *the operation*, and only by the insertion of the word *the* in the Act, could the Commission come to the conclusion that it did.

If the Congress had intended the result, as adopted by the Commission, it could have, by apt words, said as much. In other words, the Congress could have said, as follows: *Any person engaged in interstate commerce by motor vehicle on June* 1, 1935, *is entitled to continue THE type of operation so conducted on that date, and none other.* Under such wording no question would arise. But the Congress did not use such language. The obvious intent of Congress is contained in the plain and unambiguous language of the Act. No one will seriously argue but that the Act was regulatory in nature. Being so, Congress certainly must have intended to protect the interstate carriers in bona fide existence on June 1, 1935,[8] But it is unquestioned that the Congress also desired to systematize operations, and confine interstate carriers to a definite, well-defined type of service.[9] For this reason, the Act includes this language, Section 207 (a):

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[8] In Butcher Contract Carrier Application, 1 M.C.C. 485, 486-487, the Commission said:

"The whole policy evidenced in the 'Grandfather' clause indicates that the Congress did not intend to penalize operators who failed to file within a specified date, beyond requiring proof from them

which was dispensed with by those who filed in time. *It is in conformity with the declared policy to protect the interest of the public by authorizing the continuance of a transportation system which had been built over a substantial period of time rather than virtually to order its cessation.*" (Italics ours.)

9 In Blue & Gray Sightseeing Tours, Inc., Common Carrier Application, 8 M.C.C. 124, 127-128, which was a "Grandfather" Application, seeking authority to conduct sightseeing and pleasure tours over regular and irregular routes within the vicinity of Washington, D. C., the Court said:

"We have described applicant's service in detail. It consists principally of sightseeing operations, in which tickets generally are sold to individual passengers. Applicant also engages in charter operations, in which parties are transported for a lump sum, and are entitled to the exclusive occupancy of the vehicle or vehicles furnished. Some of its sightseeing operations for individual passengers, are over regular routes, and others are over irregular ones.

Section 207 (a), *which authorizes issuance of certificates,* contains the following provision: (Italics ours)

'Provided, however, that no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations'.

"Applicant's regular route operations are designed to meet the needs of sightseers, and would not serve the purposes of persons desiring expeditious transportation between points. Consequently, we conclude that applicant's regular route sightseeing operations are special operations within the meaning of the provision of Section 207 (a), quoted above. *The Act does not require that we prescribe regular routes for special operations,* and there appears to be no

need for doing so in the instant case. Omission of such prescription will make the operations flexible, and enable their adaptation to the varying demands for service. *The certificate which we shall grant, will, therefore, authorize the performance of all of applicant's special operations over irregular routes.*" (Italics ours.)

Hence it can be seen, under the ruling in this case, that the Commission itself construed Sections 206 (a) and 207 (a) together, and having decided that the applicant was entitled to "Grandfather" rights under Section 206 (a), delimited his further operations pursuant to the provisions contained in proviso 207 (a).

"Provided, however, that no such certificate shall be issued to any common carrier of passengers by motor vehicle *for operations over other than a regular route or routes and between fixed termini* except as such carriers may be authorized to engage in special or charter operations."

Appellants may contend that the expression "such certificate" pertains only to certificates authorizing new operation under their interpretation of proviso 207 (a). However, such certificate applies to a certificate of public convenience and necessity, and whether or not the applicant qualifies for a certificate under the "Grandfather" clause (Sec. 206 (a)), or a new operation (Sec. 207 (a)), "such certificate" is always a certificate of public convenience and necessity.

Further, apparently Congress intended to give the Commission some discretion in the exercise of its semi-judicial powers, when it used the language, Section 208 (a), as follows:

"*Any* certificate issued under 206 or 207 shall specify the service to be rendered, and the routes over which, the fixed termini, if any, between which, and the intermediate and off points, if any at which, and in case of operation not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate."

Obviously the Congress contemplated the desirability and feasability of different types of interstate operation, which may or may not be fixed termini service, but may be special service within a territory, and so provided by the Act for the Commission to authorize such service, but appellee forceably contends that it is incumbent upon the applicant, whether applying under the "Grandfather" clause, or the so-called "new operation" clause, that he designate either fixed termini service or special or charter service, and that the Commission then exercise its discretion, it having once approved the qualification of the operator to specify the service to be rendered.[10] Certainly such a construction of the Act would place the applicant carrier "plainly within its terms". McDonald vs. Thompson, No. 55, October term, 1938, decided December 5, 1938.

There can be no question but that the appellee was in bona fide operation as a common carrier on June 1, 1935 (Opinion, R. 16):

"Nowhere in the findings of fact is it suggested that Maher's operations were not bona fide."

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[10] See Blue and Gray Sightseeing Tours, Inc., supra.

Appellants attempt to make an issue, as to whether or not the appellee was in fact a "common carrier" within the meaning of the Act, and, consistently refer to the appellee's operation as one furnishing service only to special groups, seeking group transportation. Suffice it to say, the evidence before the Commission was such that this issue was not raised. At any rate, the Commission did not deny that the appellee undertook "to transport passengers for the general public in interstate commerce by motor vehicle for compensation", and was within the provisions of Section 203 (a) (14). While he may have, at times, carried special groups within the meaning of 203 (a) (15), there is no evidence in the record that he did not at all times hold himself out to transport passengers generally, within the "common carrier" definition.

Appellants make much of the fact that if, under the Act, an intermittent, irregular "Anywhere-for-hire" service in a territory can be converted into an absolute and vested right to establish a regular scheduled service between fixed termini, anywhere on those routes, or within that territory, irrespective of any consideration of public convenience and necessity, that such interpretation would give rise to unnecessary duplication of facilities, and wasteful competition, which would prevent the development of an adequate, economical and efficient service by motor carrier. Let it be said here, in answer to such contention, that the appellee appreciates as much

as anyone else, the importance of this proposition, but let it be remembered that at all times since 1931, the appellee could have made unlimited trips daily between Portland, Oregon, and Seattle, Washington, carrying hundreds of passengers, and as the record discloses (R. 8), "he sometimes went into the State of Washington twice a day with two cars". Then, the force of this argument vanishes, because, as a matter of fact, the so-called "duplication of facilities" and "wasteful competition" has always been present, and wherein is the public harmed, and our transportation system confused, when the operator simply designates the time and places within which his operation shall be limited?

Appellants further contend:

B. THE COMMISSION IS NOT REQUIRED TO ISSUE APPELLEE A CERTIFICATE UNDER SECTION 206 (a), AUTHORIZING A RE-ESTABLISHMENT OF ANY PART OF THE "ANYWHERE-FOR-HIRE" SERVICE WHICH HE CONDUCTED PRIOR TO MAY 29, 1936, AND ON AND BEFORE JUNE 1, 1935 (because)

1. APPELLEE DID NOT CONTINUE THE SERVICE IN WHICH HE WAS ENGAGED ON JUNE 1, 1935, AS SECTION 206 (a) REQUIRES.

Under this contention, appellant argues that because appellee instituted a fixed termini scheduled

service on May 29, 1936, between Portland, Oregon, and Seattle, Washington, that he abandoned his service to all other points theretofore served on June 1, 1935, and hence because of such abandonment of service he had not continuously "so operated" since that time (June 1, 1935).

The appellee, in answer thereto, admits for the sake of argument, that all other territory and/or service which was being served and performed on June 1, 1935, has been abandoned, save and except that territory between Portland, Oregon, and Seattle, Washington.

In the first place, the appellee did not apply for a certificate authorizing service to any points or territory, excepting the Portland to Seattle operation, and does not now, nor never has applied or asked the Commission for a certificate authorizing the re-establishment of such service.

In the second place, appellee contends that the institution of his fixed termini scheduled service between Portland and Seattle, on May 29, 1936, was not an abandonment of the service being performed within the territory on June 1, 1935, but that he has continuously operated since that date over this particular route. The test of what part of the service performed by the applicant on June 1, which has been abandoned, and what part has been retained, is contained in the application itself, and it might be said, in passing, that the applicant never desired to abandon any part of the operation so performed

on June 1, 1935, but so adjusted and regulated himself to such an operation as the Act required. Section 207 (a).

The appellants again confuse the broader intent and meaning of the Act. Appellee contends that Congress intended to protect the "service" being offered the public as of June 1, 1935, whereas the appellants consistently adhere to the constrained expression "the operation". When considered with the broader viewpoint, and consistent with the provisions of the Act, the appellee has always served and transported the public over U. S. Highway 99, between Portland and Seattle (R. 9) :[10]

> "While U. S. Highway No. 99 probably was used for at least part of the distance, on most, if not all of applicant's trips into Washington * * *."

In other words, service over U. S. Highway 99 was being performed on June 1, 1935, and has been continuously performed since that date. Where is there an abandonment of this part of the service rendered by the appellee? The Court below said (Opinion R. 18) :

> "In other words if he be held to have abandoned his rights on other routes, his operation on U. S. Highway 99 after May 29, 1936, was an attempt to increase his service thereon, rather than to abandon it."

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[10] See also Lower Court's Findings of Fact IV, V, VI, VII, VIII and IX (R. 26 and 27).

And further, appellants contend:

2. APPELLEE DID NOT APPLY FOR A CERTIFICATE AUTHORIZING THE OPERATION OF AN "ANYWHERE-FOR-HIRE" SPECIAL OR CHARTER SERVICE OVER U. S. HIGHWAY NO. 99, AND IT NOWHERE APPEARS OF RECORD THAT HE DESIRES SUCH A CERTIFICATE OR WOULD BE WILLING TO PERFORM SUCH A SERVICE.

The answer to this proposition is contained in Appellant's own brief, page 37, wherein they state:

> "It is not incumbent upon the Commission to issue a certificate of public convenience and necessity authorizing a type of service for which application has not been made."

This statement is true. The appellee did not apply for a certificate authorizing an "anywhere-for-hire", special or charter service over U. S. Highway 99, and it is beside the point whether or not he desires such a certificate, or would be willing to perform such service. And furthermore, appellants beg the question, when they state that "appellee did not apply to the Commission for a certificate authorizing the transportation of special groups of passengers over U. S. Highway 99, or any part thereof, as he was doing on June 1, 1935". There is no finding any place in the record, that appellee's business con-

sisted in transporting special groups, although he did, on certain occasions, transport special groups of passengers. He was none the less a "common carrier" within the definition of the Act, and as stated before, by his application he simply applied for a service under the procedure as provided by the Act; that is, as a common carrier of passengers over the routes and within the territory, and particularly between Portland, Oregon, and Seattle, Washington, which was over the route and within the territory he was serving on June 1, 1935.

II.

Next, the appellants contend (Appellant's Br. 38):

THE COMMISSION WAS NOT OBLIGATED TO CONSIDER APPELLEE'S APPLICATION UNDER SECTION 207 (a) OF THE ACT AND TO DETERMINE WHETHER THE PROPOSED SERVICE IS OR WILL BE REQUIRED BY THE PRESENT OR FUTURE PUBLIC CONVENIENCE AND NECESSITY (because),

A. THE PROVISIONS OF SECTION 206 (a) OF THE ACT DID NOT REQUIRE THE COMMISSION TO CONSIDER APPELLEE'S APPLICATION UNDER 207 (a).

Appellants contend that the Court below misconstrued the grammatical construction of the Act.

and particularly confused the antecedent of the word "otherwise" (appellant's Br. 39), claiming that the word "otherwise" pertains, only, in event the application under 206 (a) is not filed within the 120-day period. Again the appellants are seeking to place a forced, and strained construction upon the wording of the Act. Appellee does not so agree.

In the first place, it is believed that all grammarians are in accord, that each sentence is to convey a single thought, qualified by phrases and clauses, but in any event, a period at the end of such statement marks the termination of that particular thought. Then the succeeding sentence, while likewise stating a particular thought, with qualifications, can, in itself, qualify the prior sentence, or any phrase or clause thereof, if special reference is made thereto, which procedure can go on indefinitely to the point where it forms a paragraph, evincing the whole. But, unless special reference is made in this succeeding sentence, qualifying a particular phrase or clause in the prior sentence, then such qualification goes to the whole preceding sentence.

In the consideration of this so-called grammatical by-play, is it reasonable to suppose that the Congress was unfamiliar with the rules of syntax? Is it fair for appellants, for the sake of their argument, to reconstruct the phraseology of the Act, and arbitrarily designate a certain proceeding clause, and say that the succeeding sentence qualifies only that clause, and to ignore especially the importance

of the *period* which separates the two sentences? In other words, the Act says, in substance:

> "If the applicant has been in bona fide operation on June 1, 1935, over a route, routes or within the territory for which application is made, and has so operated since that time, and seasonably files his application, then the Commission shall issue a certificate without further proof of convenience and necessity."

This is one complete thought idea, with its qualifications, and each and every distinct provision or qualification therein stated is a condition precedent to the issuance of a certificate. Then the Act goes further, and says:

> "Otherwise the application for such certificate shall be decided in accordance with the procedure provided for in Section 207 (a), etc."

The Court must bear in mind that "such certificate" as therein referred to, means a certificate of public convenience and necessity. Why should "otherwise" refer any more to the time within which the application is to be filed, than it should to whether or not the applicant was in operation on June 1, 1935, or whether he was in *bona fide* operation on that date, or whether he was operating over a route or routes, or within the territory for which the application is made on that date, or whether he has so operated since that time?

As the Court below has so aptly said (Opinion R. 19):

"The intent of Congress was to permit no operation by an applicant after certificate had been denied, and it was therefore intended that all possibilities should be exhausted on the one application. No assumption is necessary to arrive at this conclusion, since Congress requires affirmative action by the Commission."[11]

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[11] In Bowles Common Carrier Application, 1 M.C.C. 589, application was filed within the time limited by the Act, seeking a certificate of public convenience and necessity, authorizing operation as a common carrier by motor vehicle of petroleum products over specified routes. However, the evidence disclosed that applicant was in fact a contract carrier, and the Commission so considered his application, in spite of the fact that it was not filed on the form prescribed by it. The Commission said (Page 590):

"Although the record indicates that applicant has transported property only for those with whom he has individual contract agreements, written or verbal, applicant testified that since his operations began he has held himself out to the public to accept any and all shipments of petroleum products, and that he is prepared to purchase additional equipment if the public demand should require that he do so. In view of the substantial number of contracts into which applicant had entered prior to October 15, 1935 (the effective date of the Act), the rapid increase in the amount of traffic which he hauled subsequent to that date, and the uncertainty in the minds of many concerning the distinction between a common carrier, and a contract carrier under the terms of the Motor Carrier Act of 1935, we are of the opinion that it would be unnecessarily harsh even assuming that applicant erred in respect to his former status, to grant the prayer of protestants, that the application be denied because applicant did not begin *common carrier service* prior to October 15, 1935, and continued it thereafter as stated in the application. Equity would seem to demand rather

that this application be treated as one to institute a new common carrier operation, and not as one to continue a common carrier operation instituted before Section 206 of the Act became effective, *and we shall so treat it.* We feel that by such treatment all parties will have been accorded substantial justice, since applicant will not, thereby, be relieved of the burden of proving public convenience and necessity." (Italics ours.)

In Jaax Common Carrier Application, 1 M.C.C. 597, application was filed under the "Grandfather" clause, for authority to operate as a common carrier between points in Minnesota and South Dakota. The application was filed within the time limited by the Act. The applicant included points in the application which he had not served on June 1, 1935, but which he had served subsequent to that date. The Commission said (page 599):

"An application on the proper form (B.M.C. 9—New Operation application) filed as of the same date in respect of the same extension of service would permit continuation of the operation until otherwise ordered by the Commission. In view of the circumstances in this case, we are of the opinion that this application should be construed as having the same effect, and as amended by applicant's statements at the hearing, as requesting a finding of public convenience and necessity as to this extension, and the issuance of a certificate thereunder when, as here, the record plainly establishes the need for a continuance of service *which has been carried on openly for some time, and an application on file with the Commission seeks a certificate in respect of such operation,* and the application is not opposed, we feel that the requirement of the filing of an amended application on the proper form would constitute unnecessary technicality." (Italics ours.)

It is true in the instant case, the application was opposed, but protestants also followed the procedure adopted by the Commission, and no issue was ever made as to public convenience and necessity.

In Michael Common Carrier Application, 3 M.C.C. 617, the applicant misconstrued the function of the different forms of application as adopted by the Commission, but the Commission considered a new form application (B. M.C. 9) as a "Grandfather" application (B.M.C. 2).

Whether or not the Court's contention in this respect did encourage "exaggerated claims" is beside the point. After all, we do not believe that the Congress intended to deprive bona fide operators, making an honest living, by virtue of their operations, of the opportunity to make their business consistent within the provisions of the Act, which was primarily adopted for the purpose of regulating them.

And further, appellants contend that the Commission was not obligated to consider appellee's application under Section 207 (a), because:

B. APPELLEE DID NOT APPLY FOR A CERTIFICATE UNDER SECTION 207 (a) AND HIS BILL OF COMPLAINT DOES NOT ALLEGE THAT THE PRESENT OR FUTURE PUBLIC CONVENIENCE AND NECESSITY REQUIRES HIS REGULAR OPERATION BETWEEN PORTLAND AND SEATTLE, OR THAT HE MADE ANY CLAIM, OR PRESENTED ANY EVIDENCE WITH RESPECT TO THIS ISSUE BEFORE THE COMMISSION.

In answer to this proposition, the appellee again

states that he followed the procedure adopted by the Commission in the first instance, under its construction of its regulatory powers under the Act. He had no other alternative. And, in this respect, the action of the Commission, in its entirety, including the methods adopted by it for the filing of applications, to its concluding order denying the certificate in the instant case, is under attack. An injustice would be done the appellee, if this Court could now say, in effect, that an applicant, following the dictates of the Commission, as to the forms prescribed for filing applications, loses whatever rights he may have, or had, because the procedure adopted by the Commission was erroneous in the first instance.

And further, the Act itself contemplates a showing of "public convenience and necessity", and makes a bona fide operation on June 1, 1935, a presumption that such fact exists, by virtue of the "Grandfather" clause, which states, in substance, that "public convenience and necessity" exists when an operator has once established his bona fide operation on the "Grandfather" date, and the record discloses that appellee was a bona fide interstate motor carrier operator on that date, within the territory applied for and particularly over Highway 99.[12]

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[12] Successful operation over a considerable period is some evidence that there is a need for service. Stapleton Motor Carrier Application, 4 M.C.C. 600, 601.

III.

The appellant's next proposition is:

THE DISTRICT COURT HAD NO JURISDICTION UNDER THE URGENT DEFICIENCIES ACT TO REVIEW THE ORDER OF THE INTERSTATE COMMERCE COMMISSION (Appellant's Br. 47).

The order here under review, as entered by the Commission (R. 9-10), is:

> "It is ordered that said application be and it is hereby denied effective December 10, 1937.
>
> And it is further ordered that applicant be and he is hereby notified and required to cease and desist on or before December 10, 1937, from all operation in interstate or foreign commerce, as a common carrier of passengers and their baggage by motor vehicle."

Appellants contend that this order, and every part thereof is "negative" in form and therefore not reviewable under the Urgent Deficiencies Act, c. 32, 38 Stat. 208, 219-220, 28 U.S.C. 45, 47a.

In support of this contention, it is urged that the first part of the order, denying the certificate, is merely a determination of the appellee's status as an operator and as such, the risk involved arises by virtue of the statute and not from the order itself (Appellant's Br. 49).

And further, that part of the order notifying and requiring the appellee to "cease and desist" further operation as a common carrier "adds noth-

ing to the provisions of the statute or to the risks imposed thereby"; that is, the duty of the appellee to "cease and desist" from further operation is "not governed or established by any part of the Commission's order" (Appellant's Br. 52). The appellee disagrees with both contentions, and his answer to this proposition will be here fully and completely considered.

At the outset, it may be conceded that the Court has jurisdiction to review only affirmative orders of the Commission. Proctor & Gamble vs. U. S., 225 U. S. 282; Hooker vs. Knapp, 225 U.S. 302; United States vs. Griffin, et al, receiver, 303 U.S. 226; Intermountain Rate Case, 234 U.S. 476; Lehigh Valley Railroad Co. vs. United States, 243 U.S. 412; Powell vs. United States, 300 U.S. 276; Alton Railroad Co. vs. United States, 287 U.S. 229; The Chicago Junction Case, 264 U.S. 258; Piedmont & Northern Railway Co. vs. United States, 280 U.S. 469; Standard Oil Co. vs. United States, 283 U.S. 235; Baltimore and Ohio Railroad Co. vs. United States, 298 U.S. 349.

The determining factor as to whether or not an order of the Commission is affirmative or negative is: *Does the risk or illegality arise from the order, or from the statute?* Piedmont & Northern Railway Co. vs. United States, supra.

As to the first part of the order *denying* the certificate, appellants contend that the denial "does not direct the appellee to perform any act", and "is

not the kind of order which the Commission could itself enforce against the appellee", "nor does it impose any penalities upon the appellee", "or by itself subject the appellee to the risk of criminal prosecution" (Appellant's Br. 48).

In support of this contention, appellants state that Section 206 (a) prohibits operations without a certificate of "public convenience and necessity", and the appellee now has no such certificate, because he failed to qualify under his "Grandfather" clause application, and he not only now, but at all times in the past therefore ran and runs the risk of criminal penalties fixed by the Act, since he was not, in fact, one of the carriers covered by the "Grandfather" proviso. The cases cited in support of this contention, are Piedmont & Northern Railway vs. United States, 280 U.S. 469; Lehigh Valley Railroad Co. vs. United States, 243 U.S. 412; Shannahan vs. United States, 303 U.S. 596. The order entered in these cases is based upon clearly distinguishable facts, from the facts found in the instant case.

In the Piedmont case, supra, there was a statute in effect prohibiting any railroad carrier from extending its lines, or constructing new lines without first obtaining a certificate therefor. The Piedmont Company contemplated construction of an extension of its lines wtihout first obtaining a certificate of "public convenience and necessity", claiming that the proposed construction fell within the exemption

provision of paragraph 22 of Section 1, Interstate Commerce Act, as amended by Transportation Act of 1920. The Commission denied the application, which denial was affirmed by a three-judge District Court. However, the United States Supreme Court on appeal held that the order entered was negative in form, and refused to take jurisdiction, for the reason that the order was "not susceptible of violation", and "cannot call for enforcement"; that the penalities provided in the Act "are prescribed not for violation of the order, but for violation of the provisions of the statute, and the apprehended loss would be no greater by virtue of the Commission's order, than if the railroad had commenced building without trying to secure a certificate". In other words, in this case the applicant was not exercising any privilege which it had previously rightfully enjoyed, and of which an order would summarily terminate the exercise of such right. In the instant case, the applicant was entitled to continue the privilege which he was then exercising, until an adjudication of his rights by the Commission, and the order entered by the Commission did, in fact, enjoin the appellee from the continuation of these privileges.

In the Lehigh Valley case, supra, we find a like situation, as was presented in the Piedmont case. The Panama Canal Act forbid railroads to own water routes, which might otherwise be competitive, but provided for an extension, if it did not exclude or reduce competition on the water route. The Le-

high Valley Company petitioned the Commission for a determination of its extension rights. The Commission dismissed the petition on the grounds that the company had violated the Act, saying that *"the risk is the same that it was before the order, or that it would have been if appellant had not applied to the Commission"*. Here again we do not find any pre-existing right or privilege being exercised by the applicant, nor the enjoyment of a property right, nor the lawful continued exercise of the property right being denied.

In the Shannahan case, supra, the Chicago South Shore & South Bend Railroad was an interstate electric railway, subject to the Interstate Commerce Act. The National Mediation Board requested the Commission to determine whether the railway came within the exemption of the Railway Labor Act. The Commission found that the company did not come within the exemption, and was subject to the Act, *but it issued no order on its findings*. On appeal to this Court, the nature of this determination was considered, and this Court said (page 599):

> "Its decision is not even in form of an order * * *. The decision neither commands or directs anything to be done. It was merely preparation for proper action in some proceeding which may be instituted in the future * * *. The determination is thus not enforceable by the Commission; the only action which could ever be taken on it would be by some other body. It is clearly negative * * *."

So, in the Shannahan case, while the action of the Commission was considered by this Court to be negative, there was not even an order entered in the matter.

The facts in each of the above three mentioned cases are diametrically opposite to the facts as found by the Commission itself in the instant case. The appellee, here, was found to be a bona fide operator in interstate commerce on June 1, 1935, and by virtue of this fact, he was entitled to continue his service until such a time as the Commission found otherwise. In each of the cases above referred to, the applicants claimed future rights, and not past rights and privileges, under exemptions of the existing law applicable to their operations. Nowhere can it be found that they exercised any pre-existing rights or privileges, and were authorized by the statute to continue the exercise thereof, until an order was entered by the Commission denying the right or privilege. *Hence the risk involved in those cases admittedly arises by virtue of the statute, and not the order which is negative.*

The Court must look to the substance of the order as well as the form. In Alton Railroad Co. vs. United States, 287 U.S. 229, 237, it is stated: "The jurisdiction of Courts to review orders of the Commission is not dependent upon the form in which the order is couched."

Appellee contends that that part of the order entered in the instant case *denying* the certificate

is affirmative not only in substance but in form. The appellee has been and is now operating as an interstate carrier. The operation is not illegal under the statute, while the application for a certificate is pending (206 (a). It takes a denial of the certificate by a valid order to make his continued operation a crime. In other words, because of the order the appellee's future operation was "susceptible of violation". The order could "call for enforcement", and the order did "finally adjudicate the appellee's standing", and it does, in fact "enjoin the appellee from doing a particular thing".

And, as the Court below said (Opinion R. 20):

> "In Powell vs. United States, 300 U.S. 276, 285, the Commission struck out a tariff filed by the railroad whereby it included rates relating to a station which it was contended was not upon its line. The court says, in holding the order affirmative, in effect, 'the order * * * confines the Seaboard's service within the injunction switching limits, denies leave to that carrier to furnish, and prevents it from furnishing transportation to and from Fort Benning'. In the instant case, by refusing to grant the certificate upon the facts found, the Commission did deny leave to plaintiff to furnish, and did prevent it from furnishing transportation over U. S. Highway 99, in accordance with its previous service. *This case is stronger than the Powell case, for here the plaintiff was in actual operation legally before the Act took effect.* A railroad has no legal right to operate an extension without a certificate based on a finding of public necessity and convenience. In the absence of the certificate here, the act of opera-

tion becomes a crime, and is punishable." (Italics ours.)

See also Baltimore & Ohio Railroad Co. vs. United States, 298 U.S. 349; Alton Railroad Company vs. United States, 287 U.S. 229; Intermountain Rate Case, 237 U.S. 476.

In other words, the order in the instant case *curtailed* a right and privilege which was previously enjoyed, and under the Act subject to continued enjoyment until a valid order was entered denying it. It was not a refusal to grant a right or privilege for the exercise of some future right which an operator claims. Therefore, for these reasons, the appellee contends that that part of the order *denying* the certificate is affirmative, and subject to judicial review.

Next, appellants contend that that part of the order notifying and requiring appellee to "cease and desist" while not only negative in form, is simply incidental to the dominant preceding portion of the order, and is "not decisive as to the character of the Commission's action". The appellee's answer to this proposition is that the "cease and desist" portion of the order speaks for itself, in that it contemplated future operation of the order; that is, it was not to be effective until a future date, which date established the time from whence a continued operation would be unlawful. In other words, the Act countenances continued operation by a bona fide operator, until an order is entered denying fur-

ther operations. The first part of the order, while denying the appellee's rights to further operations, must necessarily be followed by an effective date upon which the operations heretofore legally conducted are to cease, and by the very nature of the "cease and desist" order the Commission did indicate awareness of the fact that the applicant was actually engaged in an affirmative act.

Suffice it to say, all three judges below determined the "cease and desist" part of the order to be affirmative.[13]

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[13] District Judge Fee of the court below said (Opinion R. 19, 20):

> "Based upon these erroneous interpretations, the Commission issued a 'cease and desist' order. This power was conferred upon that body by the statute under certain circumstances, Section 304 (6). But it was not the intent of Congress that when an applicant attempted to have his rights confirmed by a prayer for a certificate, the Commission should be empowered to issue an injunction. 'As Congress itself cannot be, so it cannot make its agent be, the final judge of its own power under the Constitution. Congress has no power * * * to prescribe what constitutes due process of law for its ascertainment. B. and O. Railroad Co. vs. United States, supra. Judicial action is required before the Commission could enforce the provisions of the statute designed to prevent operation without a certificate, Section 305 (h); United States vs. Griffin, Receiver, No. 63, February 28, 1938, United States Supreme Court. This action in issuing a 'cease and desist' order was unquestionably affirmative.
>
> Circuit Judge Haney said (Opinion, R. 22, 23): I believe a cease and desist order is ordinarily subject to review by this court. Tap Line Cases, 234 U.S. 1. * * * Since the order was a command to the petitioner, I believe it is an affirmative order, and within our jurisdiction."

For which reasons the appellee contends that the order, and each and every part thereof here under review, is affirmative and is subject to judicial review.

RECAPITULATION OF APPELLEE'S CONTENTIONS

The appellee, in attempting to squarely face the issues involved in this controversy, has heretofore directly answered the argument of the appellants as reported. However, the appellee has a distinct understanding of the Motor Carrier Act, and is aware that the piece-meal manner in which his contentions have been advanced by way of answer, may be somewhat obscure, and for this reason hereinafter states affirmatively what he deems the true and proper construction to be placed upon the Act, and which construction the court below in effect affirmed.

INTRODUCTORY

Historically speaking, prior to 1935 the Federal government did not regulate in any manner, the transportation of passengers and their baggage in interstate commerce by motor carrier. Such regulation, as was in effect, was enacted by the respective states. The transportation of passengers by motor vehicle had its inception with the jitney bus, and because of its frequency of service, and cheaper

rates, attracted large numbers of the travelling public, resulting in a serious impairment of passenger traffic on the established railroad lines. In the beginning there was no attempt to regulate the vehicles, and the laws enacted pertained solely to the licensing of the owners or drivers of such vehicles.

These operations were generally short haul operations, and thousands of car owners, for want of a better occupation, overnight became bus operators. There was tremendous duplication of service. The equipment was generally dilapidated, and not safe for passenger use. Unlimited competition resulted in rate cutting, and rate wars, and generally speaking, the operators disappeared over night into nowhere from whence they came.

The assessment of license and millage fees against the operators was mainly for the purpose of revenue, and not for the purpose of regulation, and because the railway revenue was being seriously impaired, many of the railroads acquired the more established bus lines, and maintained the same as "fighting ships" to stifle competition. This action was generally very successful. However, during the course of years, several bus operators maintained efficient, economical and safe equipment, and established themselves as convenient, necessary and desirable bus operators.

But because of the disorganized manner in which passengers were being transported in interstate commerce by motor carriers, under state regulation.

the Congress of the United States passed the Motor Carrier Act of 1935, which Act had for its purpose, the regulation of the transportation of passengers by motor carrier in interstate commerce. The whole purpose of the Act is codified in Section 202, being entitled "Declaration of Policy and Delegation of Jurisdiction". Without quoting verbatim, paragraph (a) of said section, the attention of the Court is directed to the so-called operative words thereof, which are: "recognize and preserve the inherent advantages of"; "foster sound economic conditions in"; "promote adequate economic service"; "improve the relations"; "develop and preserve a highway traffic system"; and "cooperation with the several states". Upon the passage of the Act, the *practical* effect, contrary to the well meaning intent of the Congress, is somewhat questionable, for the reason that on the Pacific Coast, and particularly between San Francisco, California, and Seattle, Washington, a virtual monopoly by purchase has come into existence, and the established interstate carriers either own or control, or manage and supervise the so-called competitive lines, having acquired the rights by purchase, by virtue of the "predecessor in interest" provision of the "Grandfather" clause. Within the territory here particularly specified, the appellee is the only independent interstate carrier remaining.

APPELLEE'S ANALYSIS OF THE ACT

It is the contention of the appellee, that the Act, particularly Sections 206 (a), 207 (a), 208 (a), has a two-fold interpretation.

A. THE MOTOR CARRIER ACT HAS DELEGATED TO THE COMMISSION THE POWER AND AUTHORITY TO QUALIFY OPERATORS.

There are two methods by which carriers can qualify:

1. Section 206 (a), the "Grandfather" clause, which states:

> "If any such carrier, or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes, or within the territory for which application is made, and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application be made within 120 days after this section shall take effect * * *. *Otherwise the application* for *such certificate* shall be decided in accordance with the procedure provided for in Section 207 (a) * * *."

2. Section 207 (a) states:

> "A certificate shall be issued to any qualified applicant therefore if it is found that the applicant is fit, willing and able properly to perform the service proposed * * * and that the pro-

posed service to the extent to be authorized by the certificate, will be required by the present or future public convenience and necessity * *."

The appellee seasonably filed his application under the "Grandfather" clause, Section 206 (a), and requested thereby a certificate of "public convenience and necessity", authorizing an interstate operation between Portland, Oregon, and Seattle, Washington, by virtue of the fact that he was in bona fide operation over this route, and within this territory on June 1, 1935. The proof required to qualify applicant under the "Grandfather" clause, did not refer to any particular type of operation. In other words, *the operation need not be a fixed service between termini; it need not be over a regular route; it need not be hourly, daily, weekly or monthly, but so long as the applicant performed a bona fide service, either over a certain "route or routes, or within a territory"*, he should qualify as an operator under this proviso of Section 206 (a). The Commission itself has defined the meaning of bona fide to be:

> "The question as we see it, is one of fact rather than law, where the operation is openly conducted without any element of pretense, disguise or concealment, and in such a manner as to indicate a real intent to conduct and maintain a transportation business. Operations so conducted are bona fide operations contemplated by the Act." Slagel Contract Carrier Application, 2 M.C.C. 127, p. 142.

It is appellee's further contention that the pro-

visions of the "Grandfather" clause, Section 206 (a), does not require, for the purpose of qualifying an operator, that he should actually render the service applied for on the exact date specified in the Act, and The Commission has so held in this respect, as follows:

> "It obviously was not the intent of Congress that a carrier must have been in physical operation to all points to which such carrier claims to have rendered service on the exact date specified in the statute. It is apparent that if such were the intent, and purpose of the 'Grandfather' clause provision, the effect would be to destroy the business of many small irregular operators who may not actually have been in physical operation to all points in the territory claimed on the statutory date, but who did serve a great number of points therein within a reasonable time before and subsequent to that date, a more appropriate view of the "Grandfather" clause date in such cases is that a carrier is entitled thereunder to claim the territory or points which it might reasonably have served by reason of its operation prior to, as well as on the statutory date, and subsequent thereto. In other words, the question in such cases is: What was the extent of the transportation business honestly and openly carried on by the carrier, as of that date?" Cassen & Sons Application, 1 M.C.C. 771, 774.

And in the application of Hibbing Van & Transfer Company, 1 M.C.C. 540-1, the Commission ruled that a transfer company was entitled to a certificate covering irregular operations over an irregular route. The Commission excluded from the certificate only those states in which the applicant had

never made any trips, although the applicant had authority to make such trips under permits held from those particular states.

The appellee was and is a bus operator. This occupation was, and is, his only means of gaining a livelihood. The evidence in the record indisputably shows that he has conducted bus service in Oregon and Washington since 1931, and that his principal route from Portland, Oregon, into the State of Washington was over U. S. Highway 99, and most certainly within the territory adjacent to said public highway, as far north as Seattle, Washington. During the years 1935 and 1936 it is true that the service performed in interstate operations was small, but this was not due to any change in the conduct of his business, but merely because of the fact that a smaller amount of traffic was available. His operations were not conducted under "disguise", nor were they "concealed", but were carried on "openly". Therefore, appellee contends, in any event, that he should qualify as a common carrier of passengers by motor vehicle in interstate commerce under the "Grandfather" clause, Section 206 (a), regardless of the specific type of service rendered on June 1, 1935, the operative date.

B. THE MOTOR CARRIER ACT EXTENDS THE POWER AND AUTHORITY TO THE COMMISSION TO REGULATE INTERSTATE COMMON CARRIERS BY MOTOR VEHICLE IN SUCH A MANNER AS IS REASONABLE AND CONSISTENT WITH THE PUBLIC INTEREST, AND PARTICULARLY TO REGULATE SAID CARRIERS WHO HAVE OTHERWISE QUALIFIED UNDER THE ACT.

The pertinent provisions applicable to this provision are:

> Section 207 (a) "* * * provided, however, no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations other than a regular route or routes, and between fixed termini, except special or charter operations as authorized by the Commission."
>
> Section 208 (a) states: "Any certificate issued under Sections 206 or 207 shall specify the service to be rendered, and the routes over which the fixed termini, if any, between which, and the intermediate and off-route points if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which the motor carrier is authorized to operate * * *."

Appellee contends that under these sections, that the Commission has *no authority to regulate a carrier's qualifications;* that it is incumbent upon the

Commission *to regulate the service to be performed by a carrier, after such carrier has qualified.* That is, the type of certificate to be granted is reserved to the discretion of the Commission. Let it be said here, that the appellee was not technically engaged in, nor did he desire authority to operate a charter or special service. Special operations, as observed from the many reports heretofore entered by the Commission, pertain to the carrying of property under special authorization, particularly designating the type of property to be carried, time of year in which it can be carried, and the places to which it can be carried; whereas charter operations pertain to sightseeing and tourist accommodations generally. Appellant contends that under and by virtue of the above provisions that Congress in its attempt to regulate and harmonize interstate transportation of passengers by motor vehicle made it mandatory that the operator, *once qualified,* must, if he did not desire special or charter rights, confine himself to certain routes or certain termini operations, and then authorized the Commission to inquire into, and to designate the route of termini operations, and to specify the particular service to be rendered.

The appellee having operated principally over U. S. Highway 99, and most certain within the territory adjacent thereto, was within his rights to designate the route over which he sought termini rights, in view of the apparent mandatory provision

of the Act, and asked the Commission, by virtue thereof to authorize such operation and specify the service to be rendered.

It was obviously the intent of Congress to "preserve, protect and coordinate" the interstate transportation system of the nation, and it devised, in order to consummate this result, provisos in the Act, requiring operators to regularize their services in order that regulation may be more efficient. And in this respect the appellee did only that which he contends the Act required him to do. He assumed a certain route within the territory which he had previously served, and is willing to confine himself within this restricted limit, as the Commission may so specify. He is, in fact, asking for something less than he had. Is it not in harmony with the intent of Congress that the Commission could better "keep its finger" on a regular scheduled operation, rather than a varied "anywhere-for-hire" irregular operation, such as was conducted by the appellee prior to the enactment of the Motor Carrier Act?

EFFECT OF COMMISSION'S ORDER

The effect of the Commission's ruling, *in refusing to qualify* appellee, as a common carrier of passengers, and in *refusing to regulate* the appellee within the contemplation of the Motor Carrier Act; in other words, the Commission's apparent action in *regulating an operator's qualification* has been an unjust and arbitrary interpretation of the law

to the extent of taking appellee's property without due process. Under Article I, Section 8, of the Constitution of the United States, Congress shall have the power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes". It is under and by virtue of this Constitutional provision that Congress has taken upon itself the power to regulate interstate commerce by motor vehicle. When Congress once assumes authority under this Constitutional provision, it must do so with reasonableness. The regulation of commerce has been held to be, in substance:

> "It means the power to control, foster and to protect commerce, to prevent its interruption and cessation, and to enact appropriate legislation, for the fulfillment of these purposes." Wilson vs. New, 37 Sup. Ct. R. 298.

And further,

> "It is scarcely necessary to say that the power given to Congress to regulate interstate commerce does not carry with it any power to destroy or impair those guaranties of personal rights that are recognized by the Constitution as inhering in the freedom of the citizen." Interstate Commerce Commission vs. Brimson, 154 U.S. 447, p.479.

In other words, all legislation for the regulation of interstate commerce has been and must be of a nature to control, foster and to protect such commerce in such manner as to not destroy or impair personal rights of our free citizens.

DENIAL OF DUE PROCESS

Has the action of the Commission in the instant case denied the appellee his guaranties of protection and his property rights under the Constitution? We say it has, and quote:

> "We have to consider whether the right is so fundamental in due process, that a refusal of the right is a denial of due process." Twining vs. State of New Jersey, 211 U.S. 78, pg. 107.

In this respect, it is asserted that the plaintiff's most fundamental rights have been destroyed. By the order of the Commission he has lost his franchise; he has lost the right to use his personal property—his busses, in gainful occupation; he has lost his right to gain a livelihood in the one and only means that he is now capable of conducting. In other words, before passage of the Motor Carrier Act, the appellee was using the implements of his trade in a gainful occupation — now all has been taken from him through the intervention of the Commission's order.

And further:

> "The protection of private property in the Fifth Amendment, presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. The general rule, at least, is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." Penn. Coal Co. vs. Mahon, 260 U.S. 393, pg. 415.

In view of this authority, and the situation in which appellee finds himself, can it be said that his property has been taken for public use? No. Can it be said that he has received any compensation? No. In other words, *not only has the appellee had taken from him his franchise, the implements of his trade, and the right to conduct a gainful occupation,* but the same has been taken from him *not for a public use, and not for compensation, but his private property has been taken and the effect of the taking has been such as to create a monopoly in favor of private enterprise in the use of a public owned highway.*

CONCLUSION

In conclusion, it is the appellee's contention that the Commission has so arbitrarily interpreted the Motor Carrier Act as to amount to a deprivation of the free rights of the appellee. Based upon the evidence before this court, the interpretation of the Motor Carrier Act warrants a different conclusion as a matter of law, than that arrived at by the Commission. We contend that the obvious intent of the Congress, in passing the act, was to preserve, and to protect the inherent liberties of the citizens of this nation, subject to reasonable regulation, and contend, in this respect, that *where a law may be susceptible to two different interpretations, that*

that interpretation most favorable to the citiz
of the nation not only should be adopted, *but m*
be adopted, and as said in United States vs. Hud
& Delaware, 213 U.S. 366, 408, and quoted in
Abbey Dodge, 223 U.S. 166, pg. 175.

> "Where a Federal statute regulating comme
> is reasonably susceptible of two interpretati
> * * * , one of which creates a repugnancy to
> Constitution, and the other avoids such rep
> nancy—the one which makes the statute h
> monize with the Constitution *must* be adopte
> (Italics ours.)

To this proposition, the Court below has s
stantially subscribed.

WHEREFORE, it is respectfully submitted t
the decree of the lower court should be affirmed.

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EDWARD O. DOXEY,
Of Counsel.

APPENDIX

APPENDIX

The pertinent provisions of the Motor Carrier Act, 1935, c. 498, 49 Stat. 543 (U.S.C. Sup. I, Title 49, Chapter 8), read as follows:

Sec. 202* (a). It is hereby declared to be the policy of Congress to regulate transportation by motor carriers in such manner as to recognize and preserve the inherent advantages of, and foster sound economic conditions in, such transportation and among such carriers in the public interest; promote adequate, economical, and efficient service by motor carriers, and reasonable charges therefor, without unjust discriminations, undue preferences or advantages, and unfair or destructive competitive practices; improve the relations between, and coordinate transportation by and regulation of, motor carriers and other carriers; develop and preserve a highway transportation system properly adapted to the needs of the commerce of the United States, and of the national defense; and cooperate with the several States and the duly authorized officials thereof and with any organization of motor carriers in the administration and enforcement of this part.

Sec. 203 (a). As used in this part—

(14) The term "common carrier by motor vehicle" means any person who or which undertakes, whether directly or by a lease or any other arrangement, to transport passengers or property, or any class or classes of property, for the

* The designation of the sections of the Act will follow the numeration found in the statute as enacted (Act of Aug. 9, 1935, c. 498, 49 Stat. 543, Sections 201-227), rather than the numeration adopted in the Code (U. S. C. Sup. I, Title 49, Secs. 301-327).

general public in interstate or foreign commerce by motor vehicle for compensation, whether over regular or irregular routes, including such motor vehicle operations of carriers by rail or water, and of express or forwarding companies, except to the extent that these operations are subject to the provisions of part I.

Sec. 204 (a). It shall be the duty of the Commission—

(6) To administer, execute, and enforce all other provisions of this part, to make all necessary orders in connection therewith, and to prescribe rules, regulations, and procedure for such administration; and

(c) The Commission may from time to time establish such just and reasonable classifications of brokers or of groups of carriers included in the term "common carrier by motor vehicle", or "contract carrier by motor vehicle", as the special nature of the services performed by such carriers or brokers shall require; and such just and reasonable rates, regulations, and requirements, consistent with the provisions of this part, to be observed by the carriers or brokers so classified or grouped, as the Commission deems necessary or desirable in the public interest.

Sec. 206 (a). No common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: *Provided, however*, that, subject to section 210, if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor

vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or if engaged in furnishing seasonal service only, was in bona fide operation on June 1, 1935, during the season ordinarily covered by its operation, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after this section shall take effect, and if such carrier was registered on June 1, 1935, under any code of fair competition requiring registration the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such certificate. Otherwise the application for such certificate shall be decided in accordance with the procedure provided for in section 207 (a) of this part and such certificate shall be issued or denied accordingly. Pending the determination of any such application the continuance of such operation shall be lawful: *And provided further*, That this paragraph shall not be so construed as to require any such carrier lawfully engaged in operation solely within any State to obtain from the Commission a certificate authorizing the transportation by such carrier of passengers or property in interstate or foreign commerce between places within such State if there be a board in such State having authority to grant or approve such certificates and if such carrier has obtained such certificate from such board. Such transportation shall, however, be otherwise subject to the juris-

diction of the Commission under this part.

(b) Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission shall, by regulation, require. Any person, not included within the provisions of paragraph (a) of this section, who or which is engaged in transportation in interstate or foreign commerce as a common carrier by motor vehicle when this section takes effect may continue such operation for a period of one hundred and twenty days thereafter without a certificate and, if application for such certificate is made to the Commission within such period, the carrier may, under such regulations as the Commission shall prescribe, continue such operation until otherwise ordered by the Commission.

Sec. 207 (a). Subject to section 210, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied: *Provided, however,* That no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations.

Sec. 208 (a). Any certificate issued under sections 206 or 207 shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate; and there shall, at the time of issuance and from time to time thereafter, be attached to the exercise of the privileges granted by the certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, including terms, conditions, and limitations as to the extension of the route or routes of the carrier, and such terms and conditions as are necessary to carry out, with respect to the operations of the carrier, the requirements established by the Commission under section 204 (a) (1) and (6): *Provided, however*, that no terms, conditions, or limitations shall restrict the right of the carrier to add to his or its equipment and facilities over the routes, between the termini, or within the territory specified in the certificate, as the development of the business and the demands of the public shall require.

(b) A common carrier by motor vehicle operating under any such certificate may occasionally deviate from the route over which, and/or the fixed termini between which, it is authorized to operate under the certificate, under such general or special rules and regulations as the Commission may prescribe.

(c) Any common carrier by motor vehicle transporting passengers under a certificate issued under this part may transport in interstate or foreign commerce to any place special or chartered parties under such rules and regulations as the Commission shall have prescribed.